ZAINAL BIN HASHIM v. GOVERNMENT OF MALAYSIA

[P.C. (Lord Wilberforce, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen & Lord Keith of Kinkel) April 30 and July 19, 1979]

[Privy Council Appeal No. 6 of 1978]

Administrative Law — Delegation of power of Police Force Commission — Power of dismissal of constable delegated to Chief Police Officer — Power of appointment not so delegated — Dismissal of police constable by Chief Police Officer — No oral hearing given — Failure to comply strictly with procedure laid down — Declaration obtained that dismissal void — Amendment to Federal Constitution with retrospective effect — Appeal — Effect of amendment — Federal Constitution, art. 135(1).

Constitutional Law — Amendment of Constitution with retrospective effect — Whether vested rights affected — Police Force Commission — Power to dismiss, delegated to Chief Police Officer — Federal Constitution, art. 135(1).

In this case the appellant had pleaded guilty to a charge of an offence of assault under section 353 of the Penal Code and he was discharged conditionally upon his entering into a bond for a period of two years. The Chief Police Officer did not apply for a copy of the notes of evidence as laid down in the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969 but wrote to the appellant stating that action to dismiss him was intended to be taken and asking him to make representations. The appellant submitted representations but he was dismissed without being given an oral hearing. The appellant brought an action for a declaration that his dismissal was void and inoperative on the ground that as the Chief Police Officer had no power to appoint constables, dismissal of a constable by him contravened Article 135(1) of the Federal Constitution. Abdul Hamid J. in the High Court found in favour of the appellant — see [1975] 2 M.L.J. 262. Subsequently the Federal Constitution was amended, by adding a proviso that Clause (1) of Article 135 shall not apply to a case where a member of the public services was dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission and it was provided that the proviso "shall be deemed to have been an integral part of this Clause as from Merdeka Day." The Government of Malaysia appealed to the Federal Court and the Federal Court held that the proviso operated to validate the appellant's dismissal — See [1977] 2 M.L.J. 254. The appellant appealed from the decision.

Held, dismissing the appeal: (1) in this case the legislature clearly intended to give retrospective effect to the amendment and to secure that no action started after Merdeka Day, whether proceeding or not started when the amendment was made, should succeed on the ground that the power to dismiss had not been exercised by someone with power to appoint. It made no difference that the action started had got to the stage of judgment being given and was under appeal when the amendment was made. The Federal Court therefore rightly allowed the appeal from the High Court on this ground;

(2) the word "authority" in Article 135(1) and in the added proviso includes a person;

(3) the right to be heard given by Article 135(2) does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the appellant an oral hearing was a denial of natural justice;

(4) although there was a failure to comply with the procedure laid down in the regulations in this case, it did not appear that compliance with it would in this case have served any useful purpose and non-compliance did not therefore render the dismissal invalid.

Cases referred to:-

(1) *Wijesuriya* v. *Amit* [1965] 3 All E.R. 701.
(2) *Reid* v. *Reid* (1886) 31 Ch. D. 402 at p. 409.
(3) *Hutchinson* v. *Jauncey* [1951] 1 K.B. 575 at p. 579.
(4) *In re Joseph Suche & Co. Ltd.* (1875) 1 Ch. D. 48.
(5) *Young* v. *Adams* [1898] A.C. 469.
(6) *Attorney-General* v. *Vernazza* [1960] A.C. 965.
(7) *Najar Singh* v. *Government of Malaysia* [1976] 1 M.L.J. 203.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

G.T. Rajan for the appellant.

D. Farquharson and *J.G.C. Phillips* for the respondent.

Cur. Adv. Vult.

Viscount Dilhorne (delivering the judgment of the Board): The appellant was appointed a police constable in the Royal Malaysian Police Force on March 1, 1962. In 1971 he was charged with an offence under section 353 of the Penal Code of Malaysia. To that charge he pleaded guilty and he was discharged conditionally upon his entering into a bond in the sum of $500 for a period of two years. On December 22, 1971 he received notice by letter dated December 20, that he was suspended from duty with effect from December 16, 1971, the date on which he had pleaded guilty, on account of his conviction on that charge.

On December 28, 1971 the Chief Police Officer at Selangor wrote to the appellant saying that he intended to take action to dismiss the appellant from the Royal Malaysian Police on account of his conviction and telling him that he could make any representations with regard thereto in writing within fourteen days.

On December 30, 1971 the appellant submitted representations and on January 20, 1972 a letter signed by S.W. Moreira, then Deputy Chief Police Officer at Selangor, was sent to him. It contained the following sentence: "I hereby make an order of 'dismissal' with effect from December 16, 1971." The appellant was also told in this letter that he could appeal from this decision within ten days. He did so and submitted written representations to the Inspector General of Police. On February 7, 1972 he was told by letter by the Chief Police Officer that his appeal had been considered by the Inspector General and dismissed.

On August 9, 1972 the appellant started an action against the Chief Police Officer and the Government of Malaysia in which he claimed a declaration that his dismissal from the Royal Malaysian Police was void and inoperative and an order that an account be taken of the salary and emoluments due to him from the date of his purported dismissal. Later he discontinued his action against the Chief Police Officer.

In paragraph 7 of his statement of claim it was alleged that the letter of January 20, 1972 dismissing him had been signed by S.W. Moreira "for and on behalf of the first defendant", the Chief Police Officer. It was alleged that the Chief Police Officer had no power to dismiss him and that his dismissal was contrary to the provisions of the Federal Constitution. It was asserted that only the Police Force Commission had power to dismiss him and that, contrary to the requirements of natural justice, he had not had a reasonable opportunity to defend himself or to make representations with regard to his dismissal.

The trial of the action took place in the High Court at Kuala Lumpur before Abdul Hamid J. The appellant gave evidence and admitted that he had pleaded guilty to the offence with which he had been charged. He complained that he had not been given an oral hearing before he was dismissed from the police force. S.W. Moreira was called as a witness

for the appellant. He said that it was the Chief Police Officer's decision that the appellant should be dismissed and that the letter of January 20, 1972 which he signed, was written by him for and on behalf of the Chief Police Officer. Despite this evidence and the allegation in the statement of claim, in the hearing before their Lordships it was contended that the appellant had been dismissed by S.W. Moreira and that consequently his dismissal was invalid. It suffices to say that it is clear beyond all doubt from the evidence that he was dismissed by the Chief Police Officer.

Abdul Hamid J. gave judgment on March 21, 1975 in favour of the appellant on a ground on which, he said, counsel for the appellant had not made any submissions to him.

Article 135(1) of the Federal Constitution provides that: —

"No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 [one service mentioned is the police force] shall be dismissed or reduced in rank by an authority sub-ordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank."

It is obvious that "authority" in this article must include a person.

Article 140 of the Constitution provided for the creation of a Police Force Commission which by Article 140(6)(b) had power to delegate its powers and duties "to any member of the Commission or the police force". By an instrument dated August 18, 1971 the Commission delegated its functions relating to the appointment of constables to the Inspector General of Police and its functions relating to the exercise of the power to award the disciplinary punishment of dismissal to constables to "a senior police officer of and above the rank of Senior Assistant Commissioner of Police or a Chief Police Officer".

As a Chief Police Officer had no power to appoint constables, dismissal of a constable by him contravened Article 135(1) of the Constitution and it was on this ground that Abdul Hamid J. found in favour of the appellant.

The Government of Malaysia appealed and in the appeal they sought to rely on an amendment made to Article 135(1) by the Constitution (Amendment) Act which came into force on August 27, 1976 by the addition to it of the following proviso: —

"And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in that Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day."

The Federal Court, in allowing the Government's appeal, held that this proviso operated to validate the appellant's dismissal. The main question in this appeal is whether they were right in so holding.

At the time he was dismissed, as that was in breach of the Constitution, the appellant had a right to claim a declaration that he had not been dismissed and that he was entitled to the pay and emoluments he would have received but for that dismissal. He started proceedings to establish that right. He obtained judgment and but for this amendment of the Constitution, their Lordships think that he would succeed in upholding that judgment.

Now it is contended, as it was in the Federal Court, that his dismissal is validated retrospectively by this amendment and that consequently he is not entitled to the pay and emoluments which otherwise would be due to him.

That the proviso has some retrospective effect cannot be disputed. If the amendment did not cover a case of dismissal wrongful on the instant ground before a declaration had been claimed the reference to Merdeka Day would have no effect at all. In *Craies* on Statute Law (1971) 7th Ed. it is said at page 389 that

"perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

When delivering the judgment of the Board in *Wijesuriya* v. *Amit*[1] Lord Wilberforce said in construing a retrospective Act, at page 703:

"It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the amending Act, rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies."

It is to be observed that the Board in that case, which was one of an attempted retroactive enactment of a fiscal law, was only able to escape the clear retroactive language by the fact that retroactive effect could not be reconciled with the pre-existing fiscal machinery.

In the present case, in their Lordships' opinion, giving retrospective effect to this amendment made to the Constitution cannot be avoided without doing violence to the language of the amendment, but as Bowen L.J. said in *Reid* v. *Reid*[2] at page 409:

"You ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant."

Did the Legislature mean by the amendment to the Constitution to go so far as to deprive the appellant of his entitlement to a declaration that his dismissal was void and, consequently, to the pay and emoluments which but for his dismissal he would have received? Recognising that the amendment has a retrospective effect, is it possible and right to draw a distinction between a case where a dismissed constable has such a claim, a case where he has commenced an action to establish his entitlement and a case where he has obtained judgment on the trial of such a claim?

As was said in *Craies* at page 398:

"It is a well 'recognised rule that statutes should be interpreted, if possible, so as to respect vested rights' (*Hough* v. *Windlus* (1884) 12 Q.B.D. 224 per Bowen L.J. at p. 237) 'but [? and] such a construction should never be adopted if the words are open to another construction."

And at page 399:

"Where, however, the necessary intendment of an Act is to affect pending causes of action, the court will give effect to the intention of the legislature even though there is no express reference to pending actions."

This last citation is based on the observations of

Lord Evershed M.R. in *Hutchinson* v. *Jauncey*[3] at page 579 where he doubted "whether the principle ought to be expressed in quite such precise language as Jessel M.R. used in *In re Joseph Suche & Co. Ltd.*"[4] In that case Lord Jessel had said:

"It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any rights of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

If by his reference to "express terms" Lord Jessel meant that the enactment must state that it applies to pending actions, their Lordships agree with Lord Evershed's comment. In their view for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the Legislature.

Reliance was placed by Mr. Rajan on *Young* v. *Adams*.[5] In that case a civil servant in New South Wales brought an action for damages for wrongful dismissal. Five months after he had been dismissed the Public Service Act, 1895, was passed. By its 58th section it was enacted that

"Nothing in this Act, or in the Civil Service Act of 1884, shall be construed or held to abrogate or restrict the right or power of the Crown as it existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the Public Service."

Lord Watson, delivering the judgment of the Board, said that these words could not

"be reasonably construed so as to include persons who are not employed in the public service, and who, like the respondent, [the plaintiff] had ceased to be so before its power of summary dismissal was given back to the Crown." (p. 475).

The language of the 58th section is very different from that of the amendment to the Constitution. That requires Article 135(1) to be construed as if from Merdeka Day onwards it had included the proviso added by the amendment. The effect of the amendment was to deprive a constable dismissed for misconduct by a Chief Police Officer, to whom power to dismiss him had been properly delegated, of the right to maintain that his dismissal was invalid owing to the omission to delegate to the Chief Police Officer power to appoint constables. If the appellant had started his action after the operative date of the amendment, their Lordships think that in consequence of the amendment it would have been bound to fail. Otherwise the reference to Merdeka Day would have no legislative content. Can the amendment be construed so that a different result would follow if such an action had been started by a wrongly dismissed constable before the Constitution was amended? In their Lordships' opinion the answer must be in the negative. If this is right, it can make no difference that the action started had got to the stage of judgment being given for the constable and under appeal when the amendment was made. In their Lordships' view the conclusion is inescapable that the Legislature intended to secure that no such actions started after Merdeka Day whether proceeding, or not started, when the amendment was made, should succeed on the ground that the power to dismiss had not been exercised by someone with power to appoint.

It follows that in their Lordships' opinion the Federal Court in the exercise of their powers (see *Attorney-General* v. *Vernazza*[6]) rightly allowed the appeal from Abdul Hamid J. on this ground.

It was also contended for the appellant that the word "authority" in the proviso added by the amendment to Article 135(1) did not include a person. In support of this contention reference was made to the 11th Schedule of the Constitution where in the reference to section 29 of the Interpretation and General Clauses Ordinance No. 7 of 1948 the following words appear:

"Where a written law confers upon any person or authority. . . ."

it being argued that there was no need to refer to a person if the word "authority" included a person. If, it was said, the proviso was intended to apply to a person, it would have said "any person or authority". In their Lordships' opinion the Federal Court rightly rejected this contention. Article 135(1) in its unamended form refers to an authority and there clearly the word includes a person. It would indeed be odd if the proviso had added the words "any person". A person may be an authority within the meaning of that word in the Article but not every authority is a person. Indeed if the Chief Police Officer was not an "authority" what was the relevance of the view that he was unable under the Constitution to dismiss because he was an "authority" lower in rank that the authority authorised to appoint?

It was also argued that it was contrary to Article 135(2) and to natural justice that the appellant was given no opportunity of making oral representations to the Chief Police Officer and to the Inspector General though he was given the opportunity of making written representations to both of them and did so. A similar contention was advanced in *Najar Singh* v. *The Government of Malaysia*[7] and rejected by the Board. For the reasons given in that case, this contention is again rejected.

Regulation 34(1) of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969, states that:

"Where criminal proceedings against an officer result in his conviction, upon receipt of the result of the proceedings, the Head of Department shall apply to the Registrar of the court in which the proceedings against the officer had taken place for a copy of the record of the said proceedings, i.e., the charge, the notes of evidence and judgment of the court. . . ."

Mr. Rajan contended that as no such application had been made, the dismissal was void. The Chief Police Officer in evidence admitted that he had not applied and said that he had not done so as he was aware of the facts of the case from the documents in his possession. The respondents contended that the regulation was directory and not mandatory. It does not appear that compliance with it would in this case have served any useful purpose and non-compliance with it would not in their Lordships' opinion render invalid a dismissal otherwise valid.

For these reasons their Lordships will advise the Yang di-Pertuan Agong that the appeal be dismissed, that the order as to costs made by the Federal Court should not be disturbed and that the appellant should pay the costs of the appeal to the Privy Council.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Stephenson Harwood.*